APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ENTERED NOVEMBER 27, 1998

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-4127
Non-Argument Calendar

D.C. Docket No. 96-1736-civ-FAM

ELLEN AUDET, as natural mother, guardian and next best friend of Ashley Audet, a minor,

Plaintiff-Appellant,

versus

PRUDENTIAL HEALTH CARE PLAN, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 27, 1998)

Before COX, BLACK and CARNES, Circuit Judges.
PER CURIAM:

Appellant Ellen Audet appeals the district court's refusal to allow her to seek punitive damages and a jury trial in her suit to recover the costs of her daughter Ashley Audet's respiratory therapy treatments from Appellee Prudential Health Care Plan, Inc. Appellant claims that contrary to the district court's ruling, punitive damages are an available remedy under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, when a ERISA-governed managed care health insurance policy denies medical care to an insured under facts which would traditionally support punitive damages award under state law. Additionally, Appellant argues that she is entitled to a jury trial for the punitive damages claim. We hold that Appellant may not seek punitive damages or a jury trial, and therefor affirm.

This Circuit's precedent clearly does not allow for an award of punitive damages for an ERISA-based claim. In *Godfrey v. BellSouth Telecomms., Inc.*, 89 F.3d 755, 761 (11th Cir. 1996), the Court unequivocally held that "a plan beneficiary can sue to enforce her rights under the plan and under ERISA, and for equitable relief, but not for punitive or compensatory damages." Appellant relies upon the Supreme Court's decision in *Ingersoll-Rand Co. V. McClendon*, 111 S. Ct. 478 (1990). However, this Court has already considered and rejected the argument that *Ingersoll-Rand* opened the door to punitive damages claims in ERISA cases. *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 n.7 (11th Cir. 1991).

Appellant's request for a jury trial was contingent upon the punitive damages claim. Because that claim is barred, the request for a jury is moot. Moreover, our case law refuses to recognize a right to a jury trial for ERISA-based claims. *See, e.g., Chilton v. Savannah Foods & Indus., Inc.*, 814 F.2d 620, 623 (11th Cir. 1987).

Accordingly, the judgment of the District Court is affirmed.

AFFIRMED.

APPENDIX B - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ENTERED NOVEMBER 27, 1998

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 98-4127
Non-Argument Calendar

District Court Docket No. 96-1736-civ

ELLEN AUDET, as natural mother,
guardian and next best friend of
ASHLEY AUDET, a minor,

Plaintiff-Appellant,,

versus

PRUDENTIAL HEALTH CARE PLAN, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before COX, BIRCH and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 27, 1998
For the Court: Thomas K. Kahn, Clerk

By:_____
Deputy Clerk

ISSUED AS MANDATE: JAN 05, 1999

APPENDIX C - FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ENTERED DECEMBER 23, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-1736-CIV-MORENO

ELLEN AUDET, as natural Mother,
guardian and next best friend
of Ashley Audet,

Plaintiff,

vs.

PRUDENTIAL HEALTH CARE PLAN, INC.,

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court heard evidence at a non-jury trial on December 11 and 12, 1997 and pursuant to Fed.R.Civ. P. 52 makes the following findings of fact and separate conclusions of law.

The Plaintiff filed an action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

§§ 1001-1461, to recover benefits for treatments rendered to her minor daughter. Because the Court finds that the denial of benefits was arbitrary and capricious, judgment is entered in favor of Plaintiff in the amount of $2,415, the benefits due for the treatment between May 29 and September 1, 1995.

ISSUES

There is no dispute, and the Court finds, that Ashley Audet, a minor suffering from cystic fibrosis, was insured through her mother's employment plan, The Prudential Health Care Plan, Inc. A factual dispute does exist, however, as to whether the chest physiotherapy (CPT) was a type of custodial care that is excluded by the policy. The parties also dispute the legal question of whether the administrative finding that the exclusion applied should be judicially reviewed under a *de novo* review or a more deferential standard such as arbitrary and capricious.

FINDINGS AND CONCLUSIONS

At trial, the Court heard from the insured, Ellen Audet, and her daughter, the patient, Ashley Audet. The Plaintiff also called chest physiotherapists Nathan Winton and Sandra Conti. The Defendant called Nancy Murphy as the representative of the Plan. In addition, the Court reviewed the transcripts of the depositions of Anthony Cataldi, Karen Heins and Dr. Melvin Fletcher.

The testimony presented, as well as a review of the records admitted, undisputably show that the policy in question is an employee welfare benefit plan covered under the ERISA statute. There is also no dispute that chest

physiotherapy was administered to Ashley Audet to loosen the secretions that her cystic fibrosis causes to accumulate in her lungs. Likewise, there is no dispute as to the qualifications of Sandra Conti who provided the chest physiotherapy or as to the reasonableness of the amount of the bills ($2,415) for the treatment between May 29 and September 1, 1995.

The Defendant objects, however, to the Court considering the testimony of Nathan Winton, the owner of the chest physiotherapy service, and the testimony of Sandra Conti, the registered nurse who provided the therapy. The basis of the Defendant's objection is that the plan administrator was not provided with the information about which these two witnesses testified in court and therefore, under the arbitrary and capricious standard, the Court cannot consider their testimony.

Although ERISA does not provide a standard to review decision of a plan administrator, the Supreme Court in Firestone Tire and Rubber Co. V. Bruch, 489 U.S. 101 (1989) established a range of standards. There are three standards of review for plan interpretations: (1) *de novo,* applicable where the plan administrator is not afforded discretion; (2) arbitrary and capricious, where the plan administrator possesses discretion; and (3) heightened arbitrary and capricious where there is a conflict of interest. Marecek v. Bell South Services, Inc., 49 F3d 702 (11th Cir. 1995). Under the more deferential judicial standard of review, it is arguable that the Court could not consider the chest physiotherapists' opinion that the patient needed professional chest physiotherapy by someone other than her mother because that information had not been provided to the plan administrator.

The plan had denied the benefits to the insured under the exclusion for custodial care that may be provided by a nonprofessional. In other words, according to the Plan, Ashley Audet's cystic fibrosis was not sufficiently aggravated to require a professional therapist. The type of chest physiotherapy that needed to be performed could be done by a lay individual with minimal training. Therefore the insurer declined to award the benefits.

On the other hand, the insured's position is that it takes a professional to provide the type of chest physiotherapy that was necessary under the circumstances. Although a lay person may supplement that chest physiotherapy, and in fact Ashley's mother, a registered nurse,[1] provided such therapy for a long period of time, the patient's health condition required the services of Sandra Conti and Nathan Winton.

The Court finds credible the testimony of both Nathan Winton and Sandra Conti. The Court also finds that in order to provide the type of chest physiotherapy that was necessary to expel the secretions from the lungs, sufficient training was necessary. Although it is clear that one need not necessarily be a trained professional in order to perform the chest physiotherapy, because administering the therapy can cause discomfort to the patient, parents are frequently reluctant to perform the therapy properly, and many children resent receiving the therapy from their parents.

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fn.1 The fact that the insured had special skills as a registered nurse should not be considered by the Plan Administration in its decision to award benefits.

In short, the Court finds that Ashley Audet's claims for chest physiotherapy treatment by a licensed professional respiratory therapist was reasonable and medically required because of her cystic fibrosis. The Court further finds that the skills necessary to perform chest physiotherapy take it outside of the custodial care exclusion indicated in the policy. The plan defines custodial care as follows:

> - Custodial care: This means that care that provides a level of routine maintenance for the purpose of meeting personal needs. This is care that can be provided by a lay person who does not have professional qualifications, skills or training. "Custodial Care" does not include care provided in conjunction with or incidental to, the provision of medically-necessary services. (Trial Exhibit No. 1, Insurance Policy, p.2.)

It is clear that if the Court were to review the plan administrator's decision to deny benefits under a *de novo* standard, the Defendant's interpretation of the policy language and the resulting denial of benefits was erroneous. However, even under the more deferential arbitrary and capricious, level of reviews required to an ERISA plan administrator's factual findings, Paramore v. Delta Air Lines, Inc., 1997 WL 74185 (11th Cir. 1997), the court finds that the plaintiff's evidence is sufficient for a conclusion that the plan's denial of benefits was an abuse of the administrator's discretion. The Court reaches this conclusion even without considering the testimony of Winton and Conti. Simply put, Prudential erred in denying the benefits under the "Custodial Care" exclusion

based on the information provided at the time to Prudential about Ashley Audet's cystic fibrosis and specifically about the necessity of professional respiratory therapy. Indeed, the Defendant had previously paid for that type of therapy.

The defendant, through Nancy Murphy, testified that the insured did not know that home care had been provided during the month of January and that Prudential found out about such care only in February. This testimony by Ms. Murphy is credible. However, Ms. Murphy also testified that no case manager had been assigned to Ashley Audet's case, and it is obvious that an insufficient number of case managers existed (only one!) to handle the 100,000 subscribers. More importantly Ms. Murphy's recommendation to Dr. Melvyn Fletcher that the benefits should be denied was made without Ms. Murphy possessing sufficient knowledge regarding chest physiotherapy or the severity of Ashley Audet's cystic fibrosis. Ms. Murphy's opinion clearly contradicted the prescription by Dr. Birriel, the patient's own physician. None of the facts alone would be sufficient to conclude that a denial of the benefits was an abuse of the discretion given the plan administrator. However, under all of the facts considered in this case, it was arbitrary and capricious to deny the professional chest physiotherapy benefits to the insured.

The Plaintiff also presented evidence and argument that Defendant, through Karen Heines, had prepared a memorandum originally recommending professional chest physiotherapy. Defendant subsequently submitted a second memorandum modifying the recommendation to one deleting the requirement of professional chest physiotherapy. The two memos were included as part of exhibit No. 2, the

administrative record of Home Care medical services, and are attached to this Order.

The Court declines to decide the significance of such modification, finding that the Plan's action, even without assigning any bad motive to the retraction of the recommendation of such memo, was sufficiently arbitrary.

Wherefore, Judgement is entered in favor of Plaintiff in the amount of benefits totaling $2,415. The Court reserves jurisdiction on any motion for attorney's fees and costs.

DONE and ORDERED this 23rd day of December, 1997 in Miami, Dade County, Florida.

/ s /
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Austin Carr, Esq.
Edward McIntyre, Esq.

Attachment #1 to Findings of Fact and Conclusions of Law

[HOME CARE MEDICAL SERVICES LETTERHEAD]

05-10-95

To: PruCare of South Florida
From: Karen Heins C.R.T.T.
Subject: RT Evaluation for Ashley Audet

Mother was seen on May 10, 1995. During discussion concerning Ashleys' treatment it became apparnt [sic] that the need for CPT treatment BID is extremely important for the well being of Ashley. The mother has been providing the AM treatments for approximately 10 minutes prior to going to work. The mother administers aerosol treatments two times daily. This treatment is supplemented by a respiratory theripsit [sic] providing CPT twice a day Monday through Friday. The mother provides the treatment (CPT) twice a day on weekends.

[HANDWRITTEN POST-IT NOTE AFFIXED TO DOCUMENT: "Per Beth - call Tony, Jr. on this."]

In our opinion the treatment provided by the mother is not vigorous enough to provide ample treatment. Our recommendation for a meaningful treatment program is as follows.

1. Treatments continue to be two times a day. One treatment provided by the mother or other family member in AM supplemented by a percussor to provide vigorous CPT with vibration. The second treatment be provided by a therapist once a day Monday through Friday.

Our concern at this time is that although treatment probably could be provided by caregivers but, if they are not supplemented by a professional treatment we may see less than agressive [sic] treatment provided which would result in future costly treatments for Ashley.

[HANDWRITTEN NOTATION AT BOTTOM OF DOCUMENT: "Wrong letter see faxed [sic] dated 5/19/95."]

Attachment #2 to Findings of Fact and Conclusions of Law

[HOME CARE MEDICAL SERVICES LETTERHEAD]

05-10-95

To: PruCare of South Florida
From: Karen Heins C.R.T.T.
Subject: RT Evaluation for Ashley Audet

Mother was seen on May 10, 1995. During discussion concerning Ashleys' treatment it became apparent that the need for CPT treatment BID is extremely important for the well being of Ashley. The mother has been providing the AM treatments for approximatly [sic] 10 minutes prior to going to work. The mother also administers aerosol treatments two times daily. This treatment is supplemented by a respiratory therapist providing CPT twice a day, Monday through Friday. The mother provides the treatment (CPT) twice a day on weekends.

In our opinion the treatment provided by the mother is not vigorous enough to provide ample treatment. Our recommendation for a meaningful treatment program is as follows.

1. Treatments continue to be two times a day. Two treatments provided by the mother or other family member supplemented by a percussor to provide vigorous CPT with vibration. Respiratory therapist should be used PRN if indicated.

[HANDWRITTEN NOTATION AT BOTTOM OF DOCUMENT: "Olga - This is the new letter from HCM - Did you get this already? Nancy"]

APPENDIX D - JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA ENTERED DECEMBER 23, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 96-1736 CIV-MORENO

ELLEN AUDET, as natural mother, guardian and next best friend of ASHLEY AUDET, a minor,

Plaintiff,

vs.

PRUDENTIAL HEALTH CARE PLAN, INC.,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE was before the Court upon a non-jury trial held on December 11 and 12, 1997. Pursuant to the Court's separate findings of fact and conclusions of law and Fed.R.Civ.P. 54 and 58, it is

ADJUDGED that judgment is entered in favor of Plaintiff, ELLEN AUDET, as natural mother, guardian and next best friend of ASHLEY AUDET, a minor, and against

Defendants, PRUDENTIAL HEALTH CARE PLAN, INC. Defendant is liable for the amount of $2,415. Interest shall accrue on this judgment pursuant to 28 U.S.C. §1961. For which sum let execution issue. Further, it is

ADJUDGED that any pending motions are DENIED as moot. Finally, it is

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of December 1997.

/s/
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:
S. Austin Carr, Esq.
W. Edward McIntyre, Esq.